SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-693

COMMONWEALTH OF PENNSYLVANIA and BUCKS COUNTY INTERFAITH HOUSING CORPORATION, a Non-Profit Corporation, SUSAN CUMMINGS, RAMONA MORALES SERRANO, JEANNE COTTON, PEDRO ORTIZ, OLIVIA MOFFIT, Individually and on Behalf of Others Similarly Situated,

Petitioners,

v.

COUNTY OF BUCKS and BUCKS COUNTY PLANNING COMMISSION and BUCKS COUNTY HOUSING AUTHORITY and All of the Municipalities of Bucks County (Individually Named in Appendix F Herein),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. .

COMMONWEALTH OF PENNSYLVANIA AND BUCKS COUNTY INTERFAITH HOUSING CORPORATION, A NON-PROFIT CORPORATION, SUSAN CUMMINGS, RAMONA MORALES SERRANO, JEANNE COTTON, PEDRO ORTIZ, OLIVIA MOFFIT, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioners,

v.

COUNTY OF BUCKS AND BUCKS COUNTY PLANNING COMMISSION AND BUCKS COUNTY HOUSING AUTHORITY AND ALL OF THE MUNICIPALITIES OF BUCKS COUNTY (INDIVIDUALLY NAMED IN APPENDIX F HEREIN),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

The Petitioners, Commonwealth of Pennsylvania, Bucks County Interfaith Housing Corporation, a non-profit corporation, Susan Cummings, Ramona Morales Serrano, Jeanne Cotton, Pedro Ortiz, Olivia Moffit, individually and on behalf of others similarly situated, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered August 1, 1973.

OPINIONS BELOW.

The judgment of the Supreme Court of Pennsylvania, as yet unreported, appears at Appendix A, *infra*, p. A1. The opinions of the Commonwealth Court of Pennsylvania, which are reported in 8 Commonwealth Court Rep. 295, 302 A. 2d 897 (1973), appear at Appendix B, *infra*, pp. A2-A6. The opinion of the Court of Common Pleas of Bucks County is reported in 22 Bucks County Law Reporter 179 (1972), and appears at Appendix C, *infra*, pp. A7-A19. The Commonwealth Court affirmed the judgment of the Court of Common Pleas of Bucks County, Pennsylvania. A timely petition for special allowance of appeal was denied by the Supreme Court of Pennsylvania on August 1, 1973.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on August 1, 1973. See Appendix A, p. A1, *infra*. This petition for certiorari was filed less than 90 days from the date aforesaid. This Court has jurisdiction under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Whether non-resident members of minority groups, and other low-income and moderate-income persons, who have been prevented by exclusionary zoning ordinances and practices from becoming residents of the county and its municipalities, have standing to challenge the constitutionality of said ordinances and practices.

2. Whether the Commonwealth of Pennsylvania has standing to challenge the constitutionality of zoning ordinances and practices which prevent its citizens, and, in particular, citizens of the Commonwealth who are non-

residents of the county and municipalities whose actions are being challenged, from becoming residents of said county and municipalities.

3. Whether the constitutionality of zoning ordinances and practices which prevent the construction of federally-subsidized housing for members of minority groups, and other low-income and moderate-income persons, is a justiciable issue in a suit that challenges said restrictions as they apply to all land in the county and its municipalities and not to a particular site.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, which is set forth in Appendix D, p. A20, *infra,* and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which is set forth in Appendix D, p. A20, *infra.*

This case also involves the following statutes, adopted by the Congress of the United States, all of which are reprinted in pertinent part in Appendix E, pp. A21-A22, *infra.*

1. Civil Rights Act of 1870, 16 Stat. 144, 42 U. S. C. 1981.
2. Civil Rights Act of 1866, 14 Stat. 27, 42 U. S. C. 1982.
3. Civil Rights Act of 1871, 17 Stat. 13, 42 U. S. C. 1983.
4. Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. 2000(d) et seq.
5. Title VIII of the Civil Rights Act of 1968, 82 Stat. 81, 42 U. S. C. 3601 et seq.

STATEMENT OF THE CASE.

This case originated upon the filing of a complaint by persons who desire to live in federally-subsidized housing in Bucks County, Pennsylvania, non-profit corporations which desire to build federally-subsidized housing for them in Bucks County, and the Commonwealth of Pennsylvania. This is a class action brought on behalf of the class of black persons and Spanish-speaking persons who qualify by reason of income for federally-subsidized housing in Bucks County, and who desire to live in such housing in Bucks County, but have been prevented from doing so. Another class involved in the suit is all Pennsylvania citizens who desire to live in federally-subsidized housing in Bucks County and who qualify by reason of low and moderate income for acceptance in such housing. The respondents are the County of Bucks, its Planning Commission and Housing Authority, and all of the municipalities of Bucks County, a list of said municipalities being set forth in Appendix F, pp. A23-A25, *infra*.

The complaint challenges the constitutionality of exclusionary zoning ordinances and practices which have prevented, and continue to prevent, the construction of federally-subsidized housing in Bucks County.

The respondents filed preliminary objections to the complaint. The preliminary objections were sustained by the Court of Common Pleas of Bucks County, Pennsylvania, on the ground that the petitioners, as non-residents and non-landowners of the municipalities in question, did not have standing to challenge the invalidity of the zoning ordinances and practices. Further, the Court held that only a challenge to the zoning restrictions upon a specific site would be a justiciable issue and a challenge brought against the zoning ordinances and practices, not as they relate to a specific site, but as they restrict the construction

of federally-subsidized housing in general, would not be a justiciable issue.

The Commonwealth Court of Pennsylvania affirmed the order of the Court of Common Pleas, and the Supreme Court of Pennsylvania denied the petition for allowance of appeal from the judgment of the Commonwealth Court.

RAISING OF THE FEDERAL QUESTIONS.

The federal questions here presented were specifically raised in the complaint, and the relevant paragraphs of the complaint are set forth in Appendix G, pp. A26-A29, *infra*. These federal claims were thus made at the earliest opportuntiy and were reserved at each stage of the proceedings below.

The complaint was dismissed on federal grounds on the basis that petitioners did not have standing to assert their federal claims and that consideration of these federal claims would not be a justiciable issue, as set forth in Appendix C, pp. A7-A19, *infra*.

REASONS FOR GRANTING THE WRIT.

I. The Decision Below Conflicts With Decisions of This Court on Important Issues Affecting Federal Constitutional and Statutory Rights.

Discriminatory zoning ordinances and practices violate the constitutional rights of members of minority groups and low-income and moderate-income persons. By granting standing only to residents and landowners, and denying standing to those persons who have been unable to become residents because they have been excluded, the court below has prevented the persons whose constitutional rights have been violated from contesting the invalidity of the deprivation of their constitutional rights. These persons have no other forum in which to assert their claims other than the courts since they are not able to exercise the right to vote for the members of the governing bodies of the county and municipalities.

The denial of standing to future residents is necessarily a question of federal law when the rights at issue are based on constitutional provisions and federal statutes. *Allied Stores v. Bowers,* 358 U. S. 522 (1959). By refusing to hear the claims of the persons who have been excluded, the court below has denied a forum to the Petitioners in which their constitutional and federally-created claims may be litigated, even though there is no fair and substantial basis for doing so and no legitimate state interest is thereby served. *Henry v. Mississippi,* 379 U. S. 443 (1965); *Reece v. Georgia,* 350 U. S. 85 (1955).

While there are no decisions of the Supreme Court specifically recognizing the standing of future residents to

challenge the unconstitutionality of their exclusion by discriminatory zoning ordinances and practices, such persons satisfy the test for standing established in the decisions of the Supreme Court and standing has been granted to persons in comparable situations.

Even though the zoning ordinances and practices directly apply to the development of land within the municipality, they also affect the constitutional rights of persons who desire to become residents of the municipality. Their stake in the outcome of this case is immediate and personal, the governmental actions involved have caused them injury in fact, they are within the zone of interests to be protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Civil Rights Statutes, and the Federal Housing Acts, and the right which they allege has been violated—the right not to be subjected to racial discrimination in governmental actions —is one which the law protects. *Association of Data Processing Service Orgs., Inc. v. Camp,* 397 U. S. 150 (1970). Since it is the constitutional rights of future residents which are violated by exclusionary zoning, standing of future residents to challenge exclusionary zoning should be granted. This is in accord with recent decisions of this Court granting standing to other litigants to challenge governmental decisions violating their rights; *United States v. SCRAP,* — U. S. —, 93 S. Ct. 2405 (1973) and *Law Students Research Council v. Wadmond,* 401 U. S. 154 (1971).

There are also decisions concerning housing in general which grant standing to persons whose stake in the outcome of the litigation is comparable to that of the Petitioners in the instant case: *Trafficante v. Metropolitan Life Insurance Co.,* 409 U. S. 205, 93 S. Ct. 364 (1973); *Jones v.*

Mayer Co., 392 U. S. 409 (1968); *James v. Valtierra*, 402 U. S. 137 (1971); *Sullivan v. Little Hunting Park*, 396 U. S. 229 (1969); *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Barrows v. Jackson*, 346 U. S. 249 (1953); *Shannon v. United States Dept. of Housing & Urban Dev.*, 436 F. 2d 809 (3rd Cir. 1970); and *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F. 2d 920 (2nd Cir. 1968). These cases involved the same constitutional and federally-created rights relied upon by the Petitioners.

The state court also erred in denying standing to the Commonwealth of Pennsylvania to represent its citizens who desire to move from its heavily-congested counties to its developing counties. The Commonwealth, like the other Petitioners, is seeking injunctive relief and not monetary damages, and it instituted suit both under the parens patriae doctrine and as the representative of the classes referred to hereinabove. *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439 (1945); *Hawaii v. Standard Oil Co.*, 405 U. S. 251, 256, n. 7, 270, n. 3 (1972).

The constitutionality of zoning ordinances and practices which prevent the construction of federally-subsidized housing for members of minority groups, and other low-income and moderate-income persons, should be recognized as a justiciable issue in a suit that challenges said restrictions as they apply to all land within the municipality and not just to a particular site. See, in general, *Baker v. Carr*, 369 U. S. 186 (1962) and *Buchanan v. Warley*, 245 U. S. 60 (1917). If persons who have been excluded may present a justiciable claim only by challenging the zoning restrictions upon a specific site and by filing an application for development of that site, then persons who have been excluded will be prevented from contesting the validity of their exclusion since these persons are neither residents nor landowners within the municipality.

The Supreme Court has considered cases involving restrictions upon housing in general, which did not concern the validity of restrictions as they applied to a specific site: *James v. Valtierra*, 402 U. S. 137 (1971); *Reitman v. Mulkey*, 387 U. S. 369 (1967); *Hunter v. Erikson*, 393 U. S. 385 (1969); and *Village of Euclid v. Ambler Realty*, 272 U. S. 365 (1926).

The Pennsylvania courts have recognized the unconstitutionality of exclusionary zoning, *National Land and Investment Co. v. Easttown Twp. Bd. of Adj.*, 419 Pa. 504, 215 A. 2d 597 (1965), *In Re Kit-Mar Builders*, 439 Pa. 466, 268 A. 2d 765 (1970) and *In Re Girsh*, 437 Pa. 237, 263 A. 2d 395 (1970), and have established in the aforementioned cases judicially discoverable and manageable standards that may be applied to suits brought by future residents challenging the invalidity of exclusionary zoning. Since challenging exclusionary zoning has been regarded as justiciable when the suit is instituted by landowners and developers, such suits should also be held to be justiciable when instituted by the persons whose constitutional rights are at stake—the persons who have been excluded.

While the opinion of the court below refers to justiciability, since justiciability has clearly been established in Pennsylvania in suits instituted by developers, the effect of denying justiciability in the only kind of case which future residents can bring, to wit, a case which does not concern a specific site but does concern the invalidity of the restrictions imposed upon the construction of housing, is the same as denying them standing to challenge the invalidity of their exclusion and to assert their constitutional rights.

II. The Decision Below Allows Local Zoning Ordinances and Practices to Prevent Implementation of Federal Housing Acts in Violation of the Constitutional and Statutory Rights of Petitioners.

During the years 1950 to 1970, the population of Bucks County increased from 144,620 to 415,056 persons, but the percentage of black persons living in Bucks County remained at two percent or less. During the same period, the black population of the Philadelphia metropolitan area increased from 483,927 persons in 1950 to 873,030 persons in 1970. The governmental officials involved are aware that the effect of their actions is to prevent members of minority groups from living within the County and its municipalities and to perpetuate segregated residential patterns within the Philadelphia metropolitan area by ensuring that members of minority groups are not able to live in Bucks County.

The exclusionary zoning ordinances and practices of the respondents are in conflict with the housing acts and policies of the United States, in regard to satisfaction of housing needs and the availability of subsidized housing to all citizens of the United States without racial discrimination.

The situation that exists in Bucks County is typical of the national pattern. Subsidized housing is not being built within suburban areas because of exclusionary zoning ordinances and practices. Members of minority groups are thereby prevented from moving to suburban areas and are denied the benefits of the subsidized housing programs.

This case is of national significance as is indicated by the Amicus Curiae Briefs filed in support of the Petitioners with the Commonwealth Court by American Civil Liberties Union, Bucks County Board of Realtors, Camden Regional Legal Services, Inc., League of Women Voters of Penn-

sylvania, National Association for Advancement of Colored People, Pennsylvania Builders Association and National Association of Home Builders of the United States, and Pennsylvania Jewish Community Relations Conference.

The effect of the decision of the court below is to allow a state court to decide a federal question of substance—the standing of non-resident members of minority groups to challenge the unconstitutionality of exclusionary zoning ordinances and practices—not previously determined by this Court.

CONCLUSION.

For the reasons set forth above, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A.

The Judgment of the Supreme Court of Pennsylvania.

August 1, 1973

Petition Denied

Per Curiam.

APPENDIX B.

The Opinions of the Commonwealth Court of Pennsylvania.

OPINION

PER CURIAM Filed April 3, 1973

President Judge Satterthwaite of the Court of Common Pleas of Bucks County ably and thoroughly discusses and disposes of the issues raised. We affirm the order of the lower court upon his opinion reported in 22 Bucks Co. L. Rep. 179 (1972).

CONCURRING OPINION

PRESIDENT JUDGE BOWMAN Filed April 3, 1973

A multi-class action in equity seeking unprecedented judicial interference in and arrogation over the planning and zoning affairs of every local government in Bucks County, the county itself and their related boards and commissions in performance of their powers and duties as conferred and imposed upon them by the legislative branch of the government of this Commonwealth impels judicial restraint in cases such as this where the justiciable issue, while postulated upon alleged violations of constitutional rights, is but a symbolic narrative of conjecture, supposition and abstraction as supportive of the alleged cause of action. I concur.

JAMES S. BOWMAN P. J.

DISSENTING OPINION.

JUDGE KRAMER April 3, 1973.

I respectfully, but vigorously dissent. The complaint in this case sets forth a class action alleging that all zoning ordinances in Bucks County are intentionally exclusionary in violation of the constitutional rights of the enumerated classes. It seeks redress for alleged de jure discrimination by way of the requested injunctions, both mandatory and prohibitory.

The majority of this Court has affirmed the order of the court below, which sustained the preliminary objections of the defendants, which were "in the nature of demurrers".

Preliminarily, in writing this dissent, I want to make it clear that I am in complete agreement with my brothers of the majority that courts should not become involved in matters purely political. Courts should never put themselves in positions where they invade the prerogatives of either of the other two branches of government. Courts should never take on the job of legislating, even where the legislative branch refuses to or fails to act. I am in agreement that the plaintiffs in this case, in part at least, had asked the lower court to legislate. However, the prayers of the complaint are in the alternative. The plaintiffs also asked the court to declare alleged intentional exclusionary zoning legislation invalid, and this the courts can do on the making of a proper record.

I request that my position on the various issues presented to us be recorded as follows:

1. *Standing*—The plaintiffs have asserted interests which are alleged to be protected by the 14th Amendment of the United States Constitution. They have alleged injury resulting from intentional action of the named legislative

bodies in Bucks County. In ruling upon the defendants' preliminary objections, we are duty bound to accept as true all of the properly pleaded allegations of the plaintiffs. In so accepting the plaintiffs' allegations, I would find that the plaintiffs have standing. *See Pennsylvania Environmental Council, Inc. v. Bartlett,* 315 F. Supp. 238 (M. D. Pa. 1970) *aff'd.,* 454 F. 2d 613 (3rd Cir. 1971); *Association of Data Processing Organizations, Inc. v. Camp,* 397 U. S. 150, 153, 25 L. Ed. 2d 184, 188 (1970); *Gautreaux v. Chicago Housing Authority,* 296 F. Supp. 907 (N. D. Ill., 1969), *aff'd.,* 436 F. 2d 306 (7th Cir. 1970), *cert. denied,* 402 U. S. 922, 28 L. Ed. 2d 661 (1971); *Penn Galvanizing Company v. Philadelphia,* 388 Pa. 370, 130 A. 2d 511 (1957).

2. *Exclusive Remedy*—There is no question that if the plaintiffs desire to contest one single zoning ordinance of one municipality that the exclusive remedy provided is the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P. L. 805, 53 P. S. § 10101 et seq. (MPC). Here, however, the plaintiffs are attacking all of the zoning ordinances of all 54 municipalities of Bucks County. The exclusive remedy doctrine is in reality discretionary, rather than mandatory. *See United States v. Abilene & Southern Railway Company,* 265 U. S. 274, 68 L. Ed. 1016 (1924); Davis, *Administrative Law Treatise,* Volume III, Section 20.04, p. 80 (1958); Anderson, *American Law of Zoning,* Volume III, Section 24.06, p. 670 (1968); *United States v. Zmuda,* 423 F. 2d 757 (3rd Cir. 1970), *cert. denied,* 398 U. S. 960, 26 L. Ed. 2d 545 (1970); *Duquesne Light Company v. Upper St. Clair Township,* 377 Pa. 323, 105 A. 2d 287 (1954); *Bell Telephone Company of Pennsylvania v. Driscoll,* 343 Pa. 109, 21 A. 2d 912 (1941). Equity courts may take jurisdiction where to exhaust administrative remedies would be futile; and equity courts will exercise jurisdiction to prevent multiplicity of suits. *See Kramer v. Slattery,* 260 Pa. 234, 103 A. 610 (1918); *Everett v. Harron,* 380 Pa. 123, 110

A. 2d 383 (1955); Ryan, *Pennsylvania Law of Zoning*, Section 9.1.8, p. 14 (1970). Finally, I find nothing in the MPC which specifically states that it is the exclusive remedy in all zoning matters. I conclude that a court of equity may take jurisdiction to determine the constitutional validity of all of the zoning ordinances of Bucks County, based upon a record properly made.

3. *Justiciable Issue*—Based upon the recent developments of the zoning law in this Commonwealth, as found in *Girsh Appeal*, 437 Pa. 237, 263 A. 2d 395 (1970); *Concord Township Appeal* [*Kit-Mar*], 439 Pa. 466, 268 A. 2d 765 (1970); and *National Land and Investment Company v. Easttown Township Board of Adjustment*, 419 Pa. 504, 215 A. 2d 597 (1965); the issue of whether exclusionary zoning ordinances were intentionally designed in violation of the plaintiffs' constitutional rights is a justiciable issue.

One often hears the argument in cases of this type that the very purpose of zoning ordinances is to protect the existing landowners and to permit the comprehensive planning of municipalities for the benefit of their citizens. Argument is made that the United States Supreme Court in *Village of Euclid v. Ambler Realty Company*, 272 U. S. 365, 71 L. Ed. 303 (1926), the most celebrated and foundation ruling in zoning matters, established the principles of planning and land protection. It is conceivable that we have made a complete circle in this rather new development in the law of property rights and police powers. Anyone who has even cursorily observed the recent cases coming before this Court knows that zoning ordinances have been used by municipalities for the intentional purpose of excluding certain uses. *See Beaver Gasoline Company v. Zoning Board of the Borough of Osborne*, 445 Pa. 571, 285 A. 2d 501 (1971); *Daikeler v. Zoning Board of Adjustment of Montgomery Township*, 1 Pa. Commonwealth Ct. 445,

275 A. 2d 696 (1971). This dissent, however, should not be interpreted to mean that the writer is passing judgment upon the intention of the many dedicated public servants, who legislate in zoning matters in Bucks County. Quite to the contrary, the law directs judges to presume that zoning ordinances are constitutional and that the burden of anyone attacking the constitutionality of a zoning ordinance is a heavy one indeed. *Gaudenzia, Inc. v. Zoning Board of Adjustment,* 4 Pa. Commonwealth Ct. 355, 287 A. 2d 698 (1972); *Nagorny v. Zoning Hearing Board,* 4 Pa. Commonwealth Ct. 133, 286 A. 2d 493 (1971); *St. Vladimir's Ukranian Orthodox Church v. Fun Bun, Inc.,* 3 Pa. Commonwealth Ct. 394, 283 A. 2d 308 (1971).

The point is that this case is still in its preliminary stages. Only a complaint and several preliminary objections have been filed. No answer or denial has yet been filed. The issues have not been struck. No opportunity to present the facts, subject to vigorous cross-examination, has been permitted. This Court is asked to rule on a demurrer, as a matter of law, whether or not the complaint in this case establishes a cause of action in an equity court. My reading of the law does not permit me to conclude, as a matter of law, that this complaint does not state a proper cause of action.

I would reverse the court below, overrule the preliminary objections in the nature of a demurrer and order an answer to be filed.

HARRY A. KRAMER
Harry A. Kramer, *Judge.*

APPENDIX C.

The Opinion of the Court of Common Pleas of Bucks County, Pennsylvania.

OPINION and ORDER OF THE TRIAL COURT

Plaintiffs seek sweeping and drastic equitable relief against all fifty-four local municipalities in Bucks County, as well as the County itself and its planning commission and housing authority. The gravamen of the action is that the zoning ordinances of the several municipalities are all said to be unconstitutional and invalid in that they are contended to exclude so-called low and moderate income housing throughout the County.

Plaintiffs are twelve individuals who claim to be representative of both resident and non-resident classes of low and middle income persons, as well as members of black and non-English-speaking minorities, all of whom desire to reside within Bucks County but who, although they have made no applications or otherwise attempted objectively to obtain permits, allegedly will be discriminated against by reason of their station or race and will not be permitted to enjoy housing anywhere therein under such existing zoning ordinances. Also joined as plaintiffs are the Commonwealth, through the Attorney General, and two corporations allegedly desirous of developing and building low and moderate income housing in the County, although presently owning or acquiring no particular land sought to be applied to such purpose.

The complaint, in extremely prolix and multifarious fashion, including many averments of an evidentiary rather than pleading nature, ultimately sets forth various conclusionary allegations which may be taken for present purposes to place before the Court contentions of violations

of constitutional due process, denial of equal protection of the laws and other related infirmities in the provisions and applications of local zoning ordinances throughout the County, insofar as they would arguably exclude the individual and corporate plaintiffs if they actually did attempt to furnish or acquire low or moderate cost housing anywhere within such geographic limits. The relief sought is of an on-going and continuing nature against the respective municipalities, enjoining them from such allegedly discriminatory exercise of the zoning function and requiring them either to legislate in the zoning field or to require special exceptions by local zoning hearing boards so that low and moderate income housing would be permitted; against the County planning commission, directing it to prepare such a housing plan and allocate the required number of units thereof among the respective municipalities of the County; against the County housing authority, requiring it to "cooperate with . . . [the other parties, and] . . . take all necessary steps to plan for, promote and provide for the construction" of such required housing; and against the County, directing it to "take all necessary steps, including the expenditure of County funds, to ensure the construction and development of the number of dwelling units required."

Many, if not all, of the respective defendants have filed preliminary objections asserting all imaginable types of procedural as well as substantive deficiencies alleged to inhere in the complaint. For present purposes, we need not be concerned with most of these contentions. Argued improprieties of pleading form and content, as well as possible questions of non-joinder or mis-joinder of parties, and of jurisdiction at law rather than in equity, and the many other interlocutory and inconclusive problems of a like character, may be disregarded. Even assuming that all of these questions should be resolved in plaintiffs' favor

or might be cured by the filing of an amended complaint, we believe that in any event plaintiffs neither have stated, nor can state, a presently cognizable and justiciable cause of action.

It is almost hornbook law that the statutory remedies and methods of procedure to raise questions of interpretation, application and validity of zoning ordinances are exclusive and must be strictly pursued. Ever since *Taylor v. Moore,* 303 Pa. 469 (1931), the rule has been followed that all questions involving zoning problems must be resolved in the zoning forum and not through other theoretically applicable forms of action, such as an action in equity, as here, to enjoin enforcement of allegedly invalid ordinance provisions: *Jacobs v. Fetzer,* 381 Pa. 262 (1955); *Knup v. Philadelphia,* 386 Pa. 350 (1956); *Bliss Excavating Company v. Luzerne County,* 418 Pa. 446 (1965). Notwithstanding the somewhat altered forms of statutory procedures provided in zoning cases by the Pennsylvania Municipalities Planning Code, the Act of July 31, 1968, P. L. — (No. 247), 53 P. S. 10101, et seq., that legislative recodification in no sense modified or overturned the exclusiveness-of-remedy doctrine: *Unger v. Hampton Township,* 437 Pa. 399 (1970).

It is true that an established exception to the exclusiveness rule has been recognized to allow for cases where the zoning remedy is not adequate or complete or is nonexistent. See, e.g., *Duquesne Light Company v. Upper St. Clair Township,* 377 Pa. 323 (1954); *Honey Brook Township v. Alenovitz,* 430 Pa. 614, 624 (1968). Plaintiffs apparently feel that their situation is within some such exception, recognizing that they have no pending applications for permits which have been denied at the local level, but urging that this very lack of occasion to invoke the administrative remedy demonstrates the propriety of their resort to equity. This position involves a non-sequitur; it necessarily assumes that they do have a presently cognizable cause of

action and that equity must therefore necessarily be appropriate since the same may not be litigated in the zoning forum. Such a premise is unfounded. Any cause of action which they *in the future* may be thought to have, if and when they ultimately do present a concrete and subsisting factual situation which would be ripe for judicial determination, is not *presently* available to them even assuming the merit of their position on the academic constitutional and other legal propositions for which they contend.

In reality, plaintiffs seek a premature and merely advisory opinion or adjudication of the theoretical or abstract invalidity of the various zoning ordinances, as they might relate to persons of the classes they purport to represent, if and when such persons should take actual steps to procure low or moderate cost housing in Bucks County. The rendering of advisory opinions on hypothetical facts is no part of the judicial function: *Silver v. Zoning Board of Adjustment,* 381 Pa. 41, 46 (1955) and cases cited. See also, *Sgarlat v. Kingston Borough Board of Adjustment,* 407 Pa. 324 (1962); *Raezer v. Raezer,* 428 Pa. 163 (1968); *Havertown Savings and Loan Association v. Commonwealth,* 3 Comm. Ct. 266 (1971).

A court will take jurisdiction only in a case in which a challenged statute, ordinance or rule of court has been actually applied to a litigant; it does not undertake to decide academically the unconstitutionality or other alleged invalidity of legislation until it is brought into operation so as to impinge upon the rights of some person or persons: *Knup v. Philadelphia,* supra, 386 Pa. at 353.

In *Home Life Insurance Company of America v. Board of Adjustment,* 393 Pa. 447 (1958), the Supreme Court affirmed the refusal of the lower court to declare a zoning ordinance unconstitutional as to a particular property, for the reason that the property owner had merely requested

the zoning authorities so to determine without submitting any specific plans of the contemplated use. The Court noted, 393 Pa. at 452-453:

> "The appellant would have us rule that any property owner may assail a zoning ordinance as being unconstitutional even though the owner had not been denied any particular use of his property which he had sought and, in fact, had no present plans with regards to its use. This would be to hold the ordinance unconstitutional *in vacuo* which, as often declared, a court will not do.
>
> "As stated in *Knowles's Estate,* 295 Pa. 571, 585, 145 A. 797, 'In deciding constitutional attacks upon acts of assembly, the courts do not heed abstract propositions; they deal with actual conditions alone, which must not only affect the one complaining of the alleged unconstitutionality but also must affect him by reason of the particular defect that it is claimed makes the act unconstitutional.' The foregoing principle is equally applicable to attacks upon ordinances."

Compare *Kistler v. Swarthmore Borough,* 134 Pa. Superior Ct. 287 (1939); *Commonwealth v. Arnold,* 215 Pa. Superior Ct. 444, 449 (1969); *Doylestown Township Zoning Board of Adjustment v. Jaekel,* 11 Bucks Co. L. Rep. 163, 174-175 (1961).

In *Bliss Excavating Company v. Luzerne County,* supra, the Supreme Court vacated a preliminary injunction and dismissed an equity action by coal mine operators to enjoin enforcement of a newly enacted zoning ordinance which would regulate strip mining. No action to enforce the ordinance had been taken or was threatened. The opinion noted, 418 Pa. at 449-450:

> "The action was patently premature and amounted merely to an attempt to obtain an advisory opinion. Regardless of when the ordinance became effective, on December 16 or January 1, absolutely nothing had happened under the ordinance to create a case or controversy ripe for judicial intervention. The plaintiffs had not sought nor had they been denied the right to engage in any activities on their land. Nor had there been any indication or threat of enforcement. . . ."

Compare *Randall v. Clairton City,* 337 Pa. 276 (1940).

Roeder v. Hatfield Borough Council, 439 Pa. 241 (1970), is the most recent leading case on the subject and was decided with the Pennsylvania Municipalities Planning Code of 1968 in view. That decision held that proceedings by a protestant in the zoning forum under the MPC were proper for the purpose of attacking the substantive validity of an alleged "spot zoning" amendment to the basic zoning ordinance. It further held, nevertheless, that such proceedings were premature where no action had yet been taken under the amendment. The court observed, 439 Pa. at 248:

> "On many occasions, this Court has stated that questions as to the validity or constitutionality of an enactment will not be decided *in vacuo* but only after it has been actually applied to a litigant . . . This principle is applicable regardless whether the premature attack is by an action in equity or through the administrative framework, and it does not matter whether an individual is protesting a restriction on his use of his land or the permission given another to use the other's land in a particular way. In § 801 of the MPC the legislature has modified this rule somewhat as to a landowner who is restricted in the use of his land, but the Act in no way affects the rules governing

> an attack by an individual on an ordinance which grants permission to a land owner to use his land in a certain way."

See also *Linda Development Corp. v. Plymouth Township*, 3 Comm. Ct. 334, 344-345 (1971); *Levitt and Sons, Inc. v. Kane*, 4 Comm. Ct. 375, 387-388 (1972); *Penny v. Warrington Township Board of Supervisors*, 21 Bucks Co. L. Rep. 322, 329, 53 D. & C. 2d 329, 332 (1971).

For the foregoing reasons, we believe it to be improper at this time to rule upon plaintiffs' negative contentions that the zoning ordinances in question should be adjudicated invalid as anticipatorily applied to the situation which plaintiffs would propose. We also believe it to be equally improper to undertake to determine whether plaintiffs would be entitled to the affirmative portions of their prayers for relief, i.e., those which really sound as though this were an action in mandamus, whereby plaintiffs would have the Court direct the Bucks County Planning Commission and the several municipal legislative bodies to prepare on a County-wide basis, and to carry into effect at each local level, respectively, an allocated plan for low and moderate income housing and the implementation thereof through appropriate amendments to the individual zoning ordinances in question. The Court's involvement in this type of function would clearly be an intrusion into the legislative field and hence be a violation of the whole concept of separation of legislative and judicial branches of the government. The Court would thereby be injected into a political, and hence non-justiciable, controversy, a position in which the judiciary should never permit itself to be placed.

The General Assembly, by various statutes, all now superseded and codified (so far as present purposes are concerned) into Sections 302, 501, 601 and 702 of the

Pennsylvania Municipalities Planning Code, supra, 53 P. S. 10302, 10501, 10601 and 10702, has conferred upon the "governing body" of any municipality the power and authority to adopt and, presently more germane, to amend, as respective subjects of legislative action for the particular municipality, a comprehensive plan, a sub-division and land development ordinance, a zoning ordinance, and a planned residential development ordinance. The "governing body" would, of course, be the township commissioners or supervisors, or borough councilmen: Section 107(10) of the Pennsylvania Municipalities Planning Code, 53 P. S. 10107(10). At no place in this legislative scheme does the statute authorize, invite or in any way provide for participation in the enactment or amendment process by the judiciary.

The Bucks County Planning Commission is in no more authoritarian position than the Court with respect to its statutory powers over local municipal action in the planning and zoning field. Although this commission was created some years ago and formerly had functioned under Sections 2001-2011 of the County Code, 16 P. S. 2001-2011, and predecessor legislation, it likewise presently derives its power and authority from the Pennsylvania Municipalities Planning Code, supra. Bucks County as a county of the third class is a "municipality" as defined in Section 107(13), and the provisions of Article II of the MPC relating to planning agencies, accordingly, are applicable to the County planning commission.

But no provisions of the MPC confer other than a recommendatory function upon the County planning commission with respect to local municipal action on comprehensive plans, sub-division and land development regulations, zoning ordinances and planned residential development ordinances. See Sections 209, 304, 306, 502, 607 and 704,

53 P. S. 10209, 10304, 10306, 10502, 10607 and 10704. Indeed, even regulations within these respective categories as actually adopted by the County Commissioners as *County* legislation have no effect and are totally inapplicable except as to those municipalities within the County which do not have their own local ordinances: Section 502, 602 and 704, 53 P. S. 10502, 10602 and 10704. In the present case, only three or four of the fifty-four municipal defendants did not have a presently effective zoning ordinance at the time of argument herein.

In short, neither the County planning commission nor the County Commissioners, as the planning agency or the "governing body" at the County level, respectively, have any statutory power to direct local municipalities to take particular legislative action in the planning and zoning areas of the law. Accordingly, no edict from the Court in the nature of or analogous to a judgment in mandamus requiring the county agencies to promulgate and allocate such local action could properly even be entered, let alone be enforced, through the existing statutory channels provided by the MPC. Here again, the only conceivable way in which plaintiffs' prayers for affirmative relief could possibly be carried out would be for the Court to purport to compel the local municipal legislative bodies to amend, or repeal and reenact, their respective comprehensive plans, sub-division and land development regulations, zoning ordinances and planned residential development provisions in mandatory compliance with County planning commission recommendations. This the Court has no power to do, even were it so inclined. The judiciary is not a super-legislative body.

The criteria for determining in given cases what would constitute purely political and hence non-justiciable controversies in the present sense were developed and considered

at length in Justice Brennan's opinion for the majority of the Supreme Court in the famous legislative reapportionment case of *Baker v. Carr,* 369 U. S. 186, 7 L. ed. 2d 663 (1962). Relevant quotations from that opinion follow: [Emphasis supplied.]

> "We have said that 'In determining whether a question falls within [the political question] category, the appropriateness under our system of government of atttributing finality to the action of the political departments *and also the lack of satisfactory criteria for a judicial determination are dominant considerations.*' Coleman v. Miller, 307 U. S. 433, 454, 455, 83 L. ed. 1385, 1396, 1397, 59 S. Ct. 972, 122 A. L. R. 695. *The non-justiciability of a political question is primarily a function of the separation of powers . . .*" [369 U. S. at 210, 7 L. ed. 2d at 682]
>
> • • •
>
> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; *or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial determination of a kind clearly for non-judicial discretion;* or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence of a political decision already made; or the potentiality of embarrassment

from multifarious pronouncements by various departments on one question. . . .'' [369 U. S. at 217, 7 L. ed. 2d at 685-686]

In *Baker v. Carr,* of course, the Supreme Court found that none of these various elements were significantly present. The Court therefore undertook to require judicial disposition of legislative reapportionment problems, rejecting the contention that they constituted non-justiciable political questions. The Court did find satisfactory standards for determining the application of the Equal Protection Clause to achieve the quite obvious desideratum of proportionately equal representative government through the more or less fixed arithmetical standards of calculable ratios of legislators to constituents as related to particular geographic areas, and that no basic determinations of a legislative character were involved which the judiciary could not itself resolve and apply.

In the instant case, however, significantly different considerations are involved. It is certainly true that plaintiffs' premise of exclusionary zoning, if and when actually established as such, would be judicially rectified. See, e.g., *National Land and Investment Company v. Easttown Township Board of Adjustment,* 419 Pa. 504 (1965) (excessive area requirements); *Girsh Appeal,* 437 Pa. 237 (1970) (exclusion of apartments, municipality-wide); *Concord Township Appeal,* 439 Pa. 466 (1970) (excessive area requirements); compare, *Beaver Gasoline Company v. Osborne Borough,* 445 Pa. 571 (1971) (burden of proof of validity of total exclusion of service stations). On the other hand, we do not understand these or any other precedents to confer any omniscience upon the judiciary in the planning and zoning fields, or to require elimination of expertly advised and informed local legislative discretion in prescribing the extent, location, terms and conditions, and the

many other relevant factors which go into a practical and workable application of the planning and zoning function as related to any and all particular categories of uses or occupancies, including housing. As pointed out in *National Land and Investment Company*, supra, 419 Pa. at 521:

> "In the span of years since 1926 when zoning received its judicial blessing, the art and science of land planning has grown increasingly complex and sophisticated. The days are fast disappearing when the judiciary can look at a zoning ordinance and, with nearly as much confidence as a professional expert, decide upon the merits of a zoning plan and its contribution to the health, safety and morals or general welfare of the community. This Court has become increasingly aware that it is neither a super board of adjustment nor a planning commission of last resort . . . Instead, the Court acts as a judicial overseer, drawing the limits beyond which the local regulations may not go, but loathing to interfere, within those limits, with the discretion of local governing bodies . . . The zoning power is one of the tools of government which, in order to be effective, must not be subjected to judicial interference unless clearly necessary."

Accordingly, it would seem apparent that the within action, unlike that of *Baker v. Carr*, inherently and necessarily would involve the attempted answers to questions of a political and nonjusticiable nature, which answers would be beyond the competence of the Court to formulate, direct and administer. In order to meet and resolve the problems posed by plaintiffs in their presently hypothetical, far-ranging and totally unparticularized context, the Court itself, directly, or indirectly through the requested mandates to and oversight of the County planning commission

and the governing bodies of the fifty-four separate municipalities, would be required to assume the awesome task of becoming a super-planning agency, with no expertise in the field; and as such the Court would be required to make immediate and basic "initial policy determinations of a kind clearly for nonjudicial discretion", and to carry out this tremendous responsibility with an entire "lack of judicially discoverable and manageable standards for resolving it," in the language of the *Baker v. Carr* opinion, supra. This responsibility we do not believe we are required to assume, and we therefore decline to do so.

ORDER

And Now, this 17th day of April, 1972, for the reasons stated in the foregoing opinion, the preliminary objections of the respective defendants in the nature of demurrers to plaintiffs' complaint are hereby sustained, said complaint is hereby dismissed, and judgment is hereby entered against the plaintiffs and in favor of each and all of the defendants.

Judges Walsh and Rufe did not participate in the consideration or determination of this case.

By the Court,

Edwin H. Satterthwaite,
P. J.

APPENDIX D.

The Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E.

Statutory Provisions.

---

1. Civil Rights Act of 1870, 16 Stat. 144, 42 U. S. C. 1981.

> All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. Civil Rights Act of 1866, 14 Stat. 27, 42 U. S. C. 1982.

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

3. Civil Rights Act of 1871, 17 Stat. 13, 42 U. S. C. 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. 2000(d), et seq.

No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

5. Title VIII of the Civil Rights Act of 1968, 82 Stat. 81, 42 U. S. C. 3601, et seq.

It is the policy of the United States to provide, within Constitutional limitations, for fair housing throughout the United States.

APPENDIX F.
List of Municipalities of Bucks County.

BENSALEM TOWNSHIP—Municipal Building, 3800 Hulmeville Road, Cornwells Heights, Pa. 19020

BRIDGETON TOWNSHIP—Upper Black Eddy, Pa. 18972

BRISTOL BOROUGH—Municipal Building, Bristol, Pa. 19007

BRISTOL TOWNSHIP—Township of the First Class—2501 Oxford Valley Road, Levittown, Pa. 19053

BUCKINGHAM TOWNSHIP—Meeting Room, Old York Road, Buckingham, Pa. 18912

CHALFONT BOROUGH—Borough Office, 101 Main Street, Chalfont, Pa. 18914

DOYLESTOWN BOROUGH—Borough Hall, 18 North Main Street, Doylestown, Pa. 18901

DOYLESTOWN TOWNSHIP—Township Building, 425 Wells Road, Doylestown, Pa. 18901

DUBLIN BOROUGH—Borough Hall, Dublin, Pa. 18917

DURHAM TOWNSHIP—Durham, Pa. 18939

EAST ROCKHILL TOWNSHIP—Office of Secretary, Ridge Road, East Rockhill, Pa.

FALLS TOWNSHIP—Township Building, 285 Yardley Avenue, Fallsington, Pa. 19054

HAYCOCK TOWNSHIP—Township Building, Harrisburg School Road, Haycock, Pa.

HILLTOWN TOWNSHIP—Township Building, Box 15, Silverdale, Pa. 18962

HULMEVILLE BOROUGH—Council Chamber, 114 Trenton Avenue, Hulmeville, Pa.

IVYLAND BORO—DuBois and Gough Avenues, Ivyland, Pa.

LANGHORNE BOROUGH—Council Chamber, Maple Avenue, Langhorne, Pa. 19047

LANGHORNE MANOR BOROUGH—Borough Building, Prospect & Hulmeville Avenues, Langhorne Manor, Pa. 19047

Lower Makefield Township—Edgewood Road, Yardley, Pa. 19067

Lower Southampton Township—Township Building, 1500 Desire Avenue, Feasterville, Pa. 19047

Middletown Township—700 New Rodgers Road, Levittown, Pa. 19056

Milford Township—R. D. 2, Quakertown, Pa. 18951

Morrisville Borough—Borough Hall, 35 Union Street, Morrisville, Pa. 19067

New Britain Borough—170 West Butler Avenue, New Britain, Pa.

New Britain Township—Township Building, 615 Limekiln Pike, Chalfont, Pa. 18914

New Hope Borough—Borough Building, Mechanic & Main Streets, New Hope, Pa. 18938

Newtown Borough—Council Chambers, North State Street, Newtown, Pa. 18940

Newtown Township—Township Building, Rt. 413, R. D. Newtown, Pa. 18940

Nockamixon Township—Center Hill, Ferndale, Pa. 18921

Northampton Township—Township Building, 2nd Street Pike, Richboro, Pa. 18954

Penndel Borough—Borough Building, 300 Bellevue Avenue, Penndel, Pa. 19047

Perkasie Borough—Borough Building, 607 Chestnut Street, Perkasie, Pa. 18944

Plumstead Township—Township Building, Stump Road, Plumsteadville, Pa. 18949

Quakertown Borough—Borough Building, 330 West Broad Street, Quakertown, Pa. 18951

Richland Township—Township Building, 743 East Cherry Road, Quakertown, Pa. 18951

RICHLANDTOWN BOROUGH—Borough Building, South Main Street, Richlandtown, Pa. 18955

RIEGELSVILLE BOROUGH—Riegelsville, Pa. 18977

SELLERSVILLE BOROUGH—Borough Building, 140 East Church Street, Sellersville, Pa. 18960

SILVERDALE BOROUGH—Rts. 152 & 313, Silverdale, Pa. 18962

SOLEBURY TOWNSHIP, Township Building, Sugan Road, Solebury, Pa. 18963

SPRINGFIELD TOWNSHIP—Pleasant Valley, Pa. 18948

TELFORD BOROUGH—Borough Building, 122 Penn Avenue, Telford, Pa. 18969

TINICUM TOWNSHIP—Township Building, R. D., Pipersville, Pa. 18947

TRUMBAUERSVILLE BOROUGH—Trumbauersville, Pa. 18970

TULLYTOWN BOROUGH—Bordentown Road & Main Street, Tullytown, Pa.

UPPER MAKEFIELD TOWNSHIP—Township Building, Eagle Road, R. D. 2, Newtown, Pa. 18940

UPPER SOUTHAMPTON TOWNSHIP—Township Building, 939 Street Road, Southampton, Pa. 18966

WARMINSTER TOWNSHIP—Municipal Building, Henry and Gibson Avenues, Warminster, Pa. 18974

WARRINGTON TOWNSHIP—3400 Pickerton Road, Warrington, Pa. 18967

WARWICK TOWNSHIP—Administrative Building, 2045 Guinea Lane, Jamison, Pa. 18929

WEST ROCKHILL TOWNSHIP—Ridge Valley Road, Sellersville, Pa. 18960

WRIGHTSTOWN TOWNSHIP—Penns Park Road, Wrightstown, Pa.

YARDLEY BOROUGH—Municipal Building, 56 South Main Street, Yardley, Pa. 19067

APPENDIX G.

Paragraphs of Complaint.

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80. Despite substantial construction of new dwelling units in Bucks County from 1950 to the present time, much of it aided by FHA mortgage insurance and the expenditure of other federal funds, black and Spanish-speaking persons were excluded from purchasing or renting these new dwelling units and effectively excluded from moving to the County, and the small number of black and Spanish-speaking persons living in the County were confined to segregated enclaves. While federal aid was accepted for housing for relatively-wealthy white persons, no low-income housing was constructed during this period, so that low-income persons were also excluded from the County. During the late 1960's and 1970's, moderate-income persons were also excluded from the County as a result of the Defendants' discriminatory zoning practices and procedures, described in the next section, which perpetuate the discriminatory practices and procedures set forth hereinafter.

84. Since 1950, black, Spanish-speaking and all low-income persons, have been discriminatorily excluded from the County by the Defendants' failure and refusal to use the federal programs available for the construction of low-income housing.

85. While continuing to accept federal funds for the benefit of the white residents of the County, the Defendants have effectively prohibited the construction of moderate-income housing during the late 1960's and 1970's by discriminatory zoning practices and procedures, described hereinafter, which perpetuate the exclusion of black, Spanish-speaking, and moderate-income persons from the County.

87. The Defendants' policies and practices of unduly restricting low-income and moderate-income housing authorize, sanction, and encourage the exclusion of black, Spanish-speaking, low-income and moderate-income persons from the County and the confining of the small number of black and Spanish-speaking persons who do reside in the County to recognized, segregated geographic enclaves therein.

104. The lack of safe, sanitary, and decent low-income and moderate-income housing is due solely to the Defendants' failure to act to solve the problem of the critical shortage of such housing, to the perpetuation of the aforementioned discriminatory practices and procedures and to the Municipalities' misuse of the powers to plan and zone, the effect of which has been to preclude the Plaintiffs from finding safe, sanitary, and decent housing in the County.

105. Defendants must be deemed to have known, and did know, the effects of their practices and procedures in excluding black, Spanish-speaking and low-income and moderate-income persons from the County and in confining these persons to inadequate housing in segregated enclaves.

106. The practices and procedures of the Defendants have had the purpose and effect of preventing the development of housing in the County for black, Spanish-speaking, and low-income and moderate-income persons, and such practices and procedures will continue to have such purpose and effect in the future of preventing the development of such housing and of confining black, Spanish-speaking, and low-income and moderate-income persons presently living in the County to inferior, segregated, and inadequate housing unless Plaintiffs are granted the relief requested herein.

107. Defendants' housing and land-use laws, policies and practices, are arbitrary and unreasonable, bearing no

substantial relation to the health, safety, morals or general welfare of the citizens of the Commonwealth, and are contrary to the enabling legislation and to the public interest, in violation of Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

112. By perpetuating discriminatory practices and procedures, and by following discriminatory zoning practices and procedures which bear no relation to any legitimate and sufficient public purpose, the Defendants have discriminated and are discriminating against Plaintiffs on the basis of their race and place of national origin in violation of the Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

114. The purpose and effect of the zoning practices and procedures of the Municipalities has been and is to exclude black, Spanish-speaking, and low-income and moderate-income persons from the County, depriving such persons of the right to travel to and to live within the County and also the right of employment, education, and all the other benefits of the quality of life enjoyed by relatively-wealthy persons within the County.

117. The Defendants have unlawfully discriminated against the Plaintiffs on the basis of their economic status, their race, and place of national origin, in failing to provide safe, sanitary, and decent housing and in their activities which preclude the construction of said housing, in violation of the various Civil Rights Acts codified in 42 U. S. C. 1981, 1982, 1983, Title VI of the Civil Rights Act of 1964, P. L. 88-352, 42 U. S. C. Section 2000(d), *et seq.*, and Title VIII of the Civil Rights Act of 1968, P. L. 90-284, 42 U. S. C. 3601, *et seq.*

118. Plaintiffs are also being denied their congressionally established right to decent housing in that the Congress

has repeatedly affirmed the national policy of remedying unsafe and unsanitary housing conditions for families with low-income, has established a national goal of a decent home and a suitable living environment for every American family, and has declared that in the administration of the federal housing programs the highest priority in emphasis should be given to meeting the housing needs of those families whose incomes are so low that they have been denied decent and adequate housing heretofore: Section 1 of the Housing Act of 1937, P. L. 75-412, 42 U. S. C. Section 1401: Section 2 of the Housing Act of 1949, P. L. 86-372, 42 U. S. C. Section 1441; and Section 2 of the Housing and Urban Development Act of 1968, P. L. 90-448, 12 U. S. C. 1701(t).

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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-693.

COMMONWEALTH OF PENNSYLVANIA and BUCKS COUNTY INTERFAITH HOUSING CORPORATION, a Non-Profit Corporation, SUSAN CUMMINGS, RAMONA MORALES SERRANO, JEANNE COTTON, PEDRO ORTIZ, OLIVIA MOFFIT, Individually and on Behalf of Others Similarly Situated,

Petitioners,

v.

COUNTY OF BUCKS and BUCKS COUNTY PLANNING COMMISSION and BUCKS COUNTY HOUSING AUTHORITY and All of the Municipalities of Bucks County (Individually Named in Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania),

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENTS BUCKS COUNTY HOUSING AUTHORITY, BRISTOL BOROUGH, LANGHORNE MANOR BOROUGH AND LOWER MAKEFIELD TOWNSHIP.

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STATEMENT OF THE CASE.

Bucks County Housing Authority, Bristol Borough, Langhorne Manor Borough and Lower Makefield Township (being four of the fifty-six defendants named in this action) accept the petitioners' statement of the case except for what we feel are the following inaccuracies:

1. We do not agree that the Court of Common Pleas of Bucks County, Pennsylvania, held that the petitioners, as non-residents or non-landowners of the municipalities "did not have standing to challenge the invalidity of the zoning ordinances and practices". In our judgment, we believe that the Pennsylvania courts did not reach the question of petitioners' standing but held that the suit:

   a. was premature;

   b. sought a hypothetical opinion on constitutional issues;

   c. failed to follow statutory procedures under the Pennsylvania Municipalities Planning Code; and

   d. presented a non-justiciable controversy because of the "unparticularized context" of the form of the action, the multiplicity of defendants and the lack of judicially manageable standards for resolving the question in its present context.

2. The petitioners' complaint was dismissed by the Pennsylvania courts on questions of Pennsylvania statutory procedure.

ARGUMENT.

The Pennsylvania Courts Have Not Decided a Federal Question of Substance and the Petition for Certiorari Should Be Denied.

As Respondents in this Petition for Writ of Certiorari, we contend that no Federal question of substance was determined by the Pennsylvania courts in this action. The case was decided under well settled principles of Pennsylvania statutory procedures. The lower courts did not reach the constitutional questions raised herein since such questions have been raised herein in a purely hypothetical context.

In this suit, the Commonwealth of Pennsylvania, two non-profit housing corporations and thirteen individuals, on behalf of themselves and a class of others similarly situated, by a Complaint in Equity (instead of by applications to the appropriate municipal officers) have sought to invalidate the fifty-four separate zoning ordinances of all of the municipalities of Bucks County, Pennsylvania, on the grounds of alleged unconstitutional exclusion of low and middle income blacks and Spanish-speaking persons.

The trial court sustained Preliminary Objections (in the nature of demurrers) to the Complaint and declined to exercise equitable jurisdiction inter alia on the grounds that:

(a) The petitioners failed to follow the statutory remedies and procedures available under the Pennsylvania Municipalities Planning Code (Petition for Certiorari, Appendix C, page A9);

(b) The petitioners' action was premature and sought an advisory adjudication on hypothetical facts (Petition for Certiorari, Appendix C, pages A10 to A13);

(c) To the extent that affirmative relief was requested, the court did not have power to supervise directly the legislative and advisory planning functions of at least fifty-five local governmental agencies (Petition for Certiorari, Appendix C, pages A13 to A15); and

(d) The petitioners' action was not justiciable in its present form in that the form in which the action was brought afforded the court no "judicially discoverable and manageable standards" for resolving the problem (Petition for Certiorari, Appendix C, pages A15 to A19).

We do not believe that this action presents a Federal question of substance within the meaning of Supreme Court Rule 19.1(a) or that any question in this case raises any special or important reasons for the granting of a writ of certiorari. As we view the decisions of the Pennsylvania courts in this case, all that was really decided herein was a narrow question of Pennsylvania procedure.

On behalf of the four respondents which we represent, we concede that petitioners have "standing" to attack discriminatory zoning ordinances. We also concede that exclusionary zoning is unconstitutional as an abstract principle.

The Pennsylvania courts have been vigilant in protecting the rights of their citizens in zoning matters and have had no hesitancy in invalidating offending ordinances when particular uses are totally banned from any municipality and when questions of discriminatory exclusion have been raised in actual cases or controversies involving specific factual situations. *See,* e.g. *National Land and Investment Company v. Easttown Township Board of Adjustment,* 419 Pa. 504, 215 A. 2d 597 (1965) (four acre lot minimum); *Girsh Appeal,* 437 Pa. 237, 263 A. 2d 395 (1970) (exclusion

of apartments); *Concord Township Appeal,* 439 Pa. 466, 268 A. 2d 765 (1970) (two acre lot minimum); *Exton Quarries, Inc. v. Zoning Board of Adjustment,* 425 Pa. 43, 228 A. 2d 169 (1967) (exclusion of quarries); *Casey v. Zoning Hearing Board,* 8 Pa. Commonwealth Ct. 473, 303 A. 2d 535 (1973) (exclusion of apartments); *Beaver Gas Company v. Osborne Borough,* 445 Pa. 571, 285 A. 2d 501 (1971) (exclusion of service stations); *Shomo v. Derry Borough,* 5 Pa. Commonwealth Ct. 216, 289 A. 2d 513 (1972) (exclusion of mobile homes); *Daikeler v. Zoning Board of Montgomery Township,* 1 Pa. Commonwealth Ct. 445, 275 A. 2d 696 (1971) (exclusion of advertising signs); and *Delaware Institution District v. Middletown Township,* 6 Pa. Commonwealth Ct. 146, 293 A. 2d 885 (1972) (public geriatric center). The invalidity of exclusionary zoning in Pennsylvania is now settled law.

Petitioners have failed to mention in their Petition for Writ of Certiorari that two of the petitioners, *Bucks County Interfaith Housing Corporation* and *Suburban Action Institute,* both averred that they were "ready, willing and able" to build low-income housing in Bucks County, but did not aver that they were seeking judicial relief as to any specific municipal ordinances or sections thereof. (*See* our Appendix A, paragraphs 5, 6 and 133). As such entities, they should be perfectly capable of applying for specific sites and testing the alleged unconstitutionality of any one of the fifty-three zoning ordinances in the normal manner.

Pennsylvania law provides for a complete procedure to attack the validity of any zoning ordinance by anyone aggrieved by its provisions and this remedy is available to the corporate petitioners by making an application for approval of a specific housing project in any one of the defendant municipalities. As the lower court found:

> ". . . the statutory remedies and methods of procedure to raise questions of interpretation, application and

validity of zoning ordinances are exclusive and must be strictly pursued . . ." (Petitioners' Appendix C, page A9)

And also, at Petitioners' Appendix C, page A10:

"Any cause of action which they *in the future* may be thought to have, if and when they ultimately do present a concrete and subsisting factual situation which would be ripe for judicial determination, is not *presently* available to them even assuming the merit of their position on the academic, constitutional and other legal propositions for which they contend.

"In reality, plaintiffs seek a premature and merely advisory opinion or adjudication of the theoretical or abstract invalidity of the various zoning ordinances, as they might relate to persons of the classes they purport to represent, if and when such persons should take actual steps to procure low and moderate cost housing in Bucks County. The rendering of advisory opinions on hypothetical facts is no part of the judicial function . . ." (Emphasis in original).

In our view, the question in this case is substantially similar to the problem presented in *Socialist Labor Party v. Gilligan,* 406 U. S. 583, 92 S. Ct. 1716, 32 L. Ed. 2d 317 (1972). (Appeal from three judge court dismissed.) In that case, the Socialist Labor Party had sought to attack the loyalty oath provisions of the Ohio Election Code, but the impact of such provisions upon the plaintiffs had not been established by the pleadings. Under the circumstances, the court, speaking through Mr. Justice Rehnquist held that although the plaintiffs might meet the technical requirement of "standing," their case had not raised with any particularity the effect on them of Ohio's affidavit requirement. As the court stated:

> "This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form.' *Rescue Army v. Municipal Court,* 331 U. S. 549, 584, 67 S. Ct. 1409, 1427, 91 L. Ed. 1666 (1947). Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present."

We will not repeat here at length the long history of Pennsylvania decisions which have held that questions concerning the constitutional validity of municipal zoning ordinances are properly brought under the statutory procedures available under the zoning enabling acts rather than through actions in equity. These cases are reviewed in the opinion of President Judge Satterthwaite for the Common Pleas Court at pages A9 through A13 of Petitioners' Petition for Writ of Certiorari, Appendix C.

The Pennsylvania principles of pleading procedure and jurisdiction of equity courts which resulted in the dismissal of *this particular suit* against the municipal defendants do not prohibit petitioners from bringing an action in the future to contest the validity of any one of the ordinances under an *actual case and controversy* should the need arise. But when any potential constitutional question which might be raised by petitioners is so inter-related with state statutory questions of pleadings, the appropriateness of the forum, and the form of the action, the constitutionality of which are not in issue, the exercise of certiorari jurisdiction by your honorable Court is not warranted. *Compare Duncan v. Tennessee,* 404 U. S. 821, 92 S. Ct. 121, 30 L. Ed. 2d 49 (1971) (certiorari granted), 405 U. S. 127, 92 S. Ct. 785, 31 L. Ed. 2d 86 (1972) (writ dismissed).

CONCLUSION.

Respondents respectfully request that the Court enter its order denying the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

EDWIN N. POPKIN,
BEGLEY, CARLIN, MANDIO, KELTON AND POPKIN,
Attorneys for Bucks County Housing Authority, Bristol Borough, Langhorne Manor Borough, Lower Makefield Township, Respondents.

APPENDIX A.

Paragraphs of Complaint.

5. Plaintiff Bucks County Interfaith Housing Corporation is a non-profit housing development corporation having its principal office at 32 North Broad Street, Doylestown, Bucks County, Pennsylvania, incorporated under the laws of the Commonwealth for the purpose of sponsoring, developing, and building low-income and moderate-income housing, and said Plaintiff is ready, willing, qualified and able to build such housing in Bucks County, but is unable to do so for the reasons set forth hereinafter.

6. Plaintiff Suburban Action Institute is a non-profit charitable trust organized under the laws of the State of New York, having its principal office at 180 West Post Road, White Plains, New York, which, with its subsidiary non-profit development corporations, sponsors, develops and builds low-income and moderate-income housing, and said Plaintiff is ready, willing, qualified and able to build such housing in Bucks County, but is unable to do so for the reasons set forth hereinafter.

133. Plaintiff Corporations are ready, willing and able to construct low-income and moderate-income housing in the County and would proceed to purchase and develop sites suitable for such purposes if the discriminatory aspects of the present practices and procedures of the Defendants were eliminated, and unless there is jurisdiction in equity, a multiplicity of suits will have to be filed in the future for the causes of action set forth herein and for each and every project in each municipality.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-693

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Petitioners

v.

COUNTY OF BUCKS, *et al.*

and

ALL OF THE MUNICIPALITIES OF BUCKS COUNTY,
Respondents

BRIEF FOR RESPONDENTS

Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

STEPHEN B. HARRIS
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Attorney for Respondents
(Individually named in Appendix "B" herein)

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COUNTER-STATEMENT OF THE CASE

The instant action was begun by a complaint in equity which requested both injunctive and affirmative relief. "The gravamen of the action is that the zoning ordinances of the fifty-four local municipalities of Bucks County were all said to be unconstitutional and invalid in that they are contended to exclude low and moderate income housing throughout the County." [Opinion of the Honorable Edwin H. Satterthwaite, Judge of the Court of Common Pleas of Bucks County, Petitioner's Appendix "C", A7] The injunctive relief requests that the zoning ordinances of all municipalities within Bucks County be declared null and void. The affirmative relief requests the court to supervise the reformation of the zoning ordinances of all the municipalities of Bucks County to provide, on a county-wide basis, a plan for low and moderate income housing.

In addition to the classes of plaintiffs mentioned in the petitioner's statement of the case, there is an additional class of plaintiffs that is represented by two non-profit organizations, on their own behalf and on behalf of approximately fifty other similarly situated organizations that desire to build low and moderate income housing in Bucks County (Respondent's Appendix "A").

The complaint was not denied by the trial court for the lack of standing of the plaintiffs. The question of standing was not reached by the court, rather the court sustained the preliminary objections of the plaintiff in the nature of a demurrer (a Pennsylvania procedure in which an adverse party may raise preliminarily the question of whether the plaintiff has stated a cause of action upon which relief may be granted—the court in the instant case, determining that the plaintiffs did not). The first reason cited by the court was that the suit was premature and requested an advisory opinion on a hypothetical set of facts. Secondly, the court held that a complaint in equity did not lie as there is an adequate and exclusive remedy at law, pursuant to the Pennsylvania Municipalities Planning Code, Act of July 31,

1968, P.L. —, No. 247 (hereinafter referred to as MPC) 53 Purdon's Statutes Annotated (hereinafter referred to as P.S. §10101 *et seq.*). Thirdly, that the court did not have the power to grant the affirmative relief requested. And, finally, the relief requested was non-justiciable, because it involved a political question and there was a lack of judically discoverable and manageable standards for resolving the question.

REASONS FOR DENYING THE WRIT

The state court's decision dismissing the petitioner's complaint in equity rests on adequate independent state grounds, and therefore, there is no federal question presented to your Court for decision.

The United States Supreme Court is permitted to review decisions of the highest court of a state:

> "By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn into question or where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States." 28 U.S.C. 1257(3).

There must have been a federal question presented to and decided by the state court in order for a Writ of Certiorari to lie.

The United States Supreme Court, from the time of its foundation, has adhered to the principle that it will not review judgments of a state court which rest upon adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117. As the court there observed:

> "The reason is so obvious that it rarely has been thought to warrant statement. It is found in the partitioning power between the state and federal jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion." Id. at p. 119.

The "adequate state ground" rule applies to procedural as well as substantive state grounds. See Note—*"Supreme Court Treatment of State Procedural Grounds Relied on in State Courts to Preclude Decision of Federal Questions"*, 61 Columbia L. Rev. 255 (1961).

The Court, as early as 1914, held that in order to raise a federal question which the Court would review, the federal right had to be asserted according to the proper state procedures. *Louisville and Nashville Railroad Company v. Woodford*, 234 U.S. 46 (1914); *Atlantic Coastline Railroad Company v. Mims*, 242 U.S. 532 (1917); *Hartford Life Insurance Company v. Johnson*, 249 U.S. 490 (1919). There can be little doubt that it rests with each state to prescribe the jurisdiction of its courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy then when the case turns entirely upon questions of local or general law. *John v. Paullin*, 231 U.S. 583 (1913); *Fay v. Noia*, 372 U.S. 391 (1963).

The Supreme Court of Pennsylvania dismissed the petitioner's petition for allowance of appeal to that court, *per curiam*. The Commonwealth Court of Pennsylvania, the intermediate appellate court that heard the instant case, affirmed it *per curiam*, on the basis of the opinion of Honorable Edwin H. Satterthwaite, President Judge of the Court of Common Pleas of Bucks County. Therefore, with the above general principles in mind, we will review the decision of Judge Satterthwaite, contending that he decided the case on an adequate state ground and that, therefore, no federal question is involved and the petition should be denied.

A. The complaint was dismissed because the petitioners failed to follow the exclusive procedure to challenge the constitutionality of a zoning ordinance.

The petitioner brought an action in equity seeking to declare the zoning ordinances of the fifty-four municipali-

ties of Bucks County unconstitutional. The Act of March 21, 1806, P.L. 558, 4 Sm. L. 326, §13, 46 P.S. §156 provides:

> "*Acts of Assembly to be Strictly Pursued.* In all cases where a remedy is provided, or a duty enjoined, or anything directed to be done by any act or acts of assembly of this Commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect."

MPC provides an administrative procedure to review the constitutionality of a zoning ordinance by any person aggrieved by the ordinance. It also provides for an appeal to the courts from the administrative decision. The Supreme Court of Pennsylvania has uniformly held that the MPC provides an adequate remedy to determine all challenges to the constitutionality of a zoning ordinance. E.g. *Unger v. Township of Hampton*, 437 Pa. 399 (1970). The court in *Unger* also concluded that because the procedure under the MPC is adequate, it is the exclusive remedy to challenge the validity of zoning ordinances. As Judge Satterthwaite stated in his opinion sustaining the respondents' preliminary objections:

> "It is almost hornbook law [in Pennsylvania] that the statutory remedies and the methods of procedure to raise questions of interpretation, application and validity of zoning ordinances are exclusive and must be strictly pursued. Ever since *Taylor v. Moore*, 303 Pa. 469 (1931), the rule has been followed that all questions involving zoning problems must be resolved in the zoning forum and not through other theoretically applicable forms of action, such as an action in equity, as here, to enjoin the enforcement of allegedly invalid ordinance provisions: *Jacobs v. Fetzer*, 381 Pa. 262 (1955); *Knup v. Philadelphia*, 386 Pa. 350 (1956) *Bliss Excavating Company v. Luzerne County*, 418 Pa. 446 (1965)." (Petitioner's Appendix "C", A9)

The case is similar to *Melon Company v. McCafferty*, 239 U.S. 134 (1915), where the decision of the state court was found to have rested on an independent ground broad enough to sustain it wholly irrespective of the federal rights asserted under the due process and equal protection clauses of the Fourteenth Amendment and your Honorable Court concluded it lacked jurisdiction. The state court in *Melon* had held that the bill stated no relief in equity because it failed to allege that resort had been had to adequate administrative remedies provided by state law for challenging tax assessments. The court also remarked that the duty to resort to the adequate remedies provided could not be escaped by assuming that if the remedies had been resorted to, the wrong complained of would not have been rectified. Similarly, in the instant case, the court has ruled that no complaint in equity will lie where there is an adequate remedy at law, and therefore, the petition should also be dismissed for lack of jurisdiction. *See also, McQuade v. Trenton*, 172 U.S. 636 (1899) (adequate state ground—dismissal of request for injunction where petitioner had mistaken his remedy and had failed to resort to proper proceeding against the city for damages); *Farson, Son & Company v. Bird*, 248 U.S. 268 (1919) (adequate state ground—dismissal of request for mandamus because mandamus is not available against the particular officer against whom suit was brought, but rather lay against the County Board of Revenue); *Herb v. Pitcairn, supra* (adequate state ground—complaint properly dismissed where, under state jurisdiction and venue laws, a city court, in which a Federal Employers Liability Act action was commenced, lacked jurisdiction even to transfer the case to a county court which did have jurisdiction).

B. The complaint was dismissed because it was premature.

As an additional ground for dismissal, the trial court also concluded that the instant law suit was not ripe for

decision and merely sought an advisory opinion on the constitutionality of the zoning ordinances of the municipalities of Bucks County. The complaint failed to allege that any petitioner had applied to any respondent for a zoning change, building permit, variance or special exception. The complaint also failed to allege that any petitioner owns land or has an interest in land within any respondent or that any petitioner desires to develop land in any municipality, in a manner that is prohibited by a zoning ordinance. The complaint also failed to aver that any petitioner had been prevented from developing any real estate for low or moderate income housing by any respondent.

The complaint merely alleges the desire to have low and moderate income housing at some point in the future somewhere within Bucks County. Thus, the petitioners seek to litigate the constitutionality of municipal zoning ordinances without any assurance that if the ordinances are declared unconstitutional, that any one will build low and moderate income housing at any time now or in the future at any location within Bucks County.

The courts in Pennsylvania have uniformly held that:

> A Court will take jurisdiction only in a case in which a challenged statute, ordinance, or rule of Court has actually been applied to a litigant; it does not undertake to decide academically the unconstitutionality or other alleged invalidity of legislation until it is brought into operation so as to impinge upon the rights of some person or persons. *Knup v. Philadelphia, supra* at 353.

The Supreme Court of Pennsylvania has reached the same conclusion in many other cases. E.g. *Bliss Excavating Company v. Luzerne County, supra; Home Life Insurance Company v. Board of Adjustment*, 393 Pa. 447 (1958); *Roeder v. Hatfield Borough Council*, 439 Pa. 241 (1970).

The policy of the Pennsylvania courts not to decide hypothetical questions, is identical to the policy of the United States Supreme Court which has been stated as follows:

> The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is in immediate danger of sustaining some direct injury as a result of its enforcement and not merely that he suffers in some indefinite way in common with people generally. *Commonwealth of Massachusetts v. Melon*, 262 U.S. 447, 448 (1923); *cf. Doremus v. Board of Education*, 342 U.S. 429 (1952)

The Pennsylvania court did not conclude that the petitioners did not have standing; they simply did not reach the question in concluding that the case was not ripe for decision. The issue of ripeness is not synonymous with the issue of standing. Petitioners assert that ripeness for the future resident of a low and moderate income housing project can only mean that he is presently living in adequate housing and desires better housing and can establish the unconstitutional governmental activities which have denied him housing. The argument is fallacious. The zoning ordinances cannot have denied appellants housing since to date, no one has attempted to build a low and moderate income housing project and been denied. Furthermore, even if the petitioners were successful in this law suit, there is no guarantee that at any time in the future would low and moderate income housing be built in Bucks County. Even after a successful result, the petitioners will remain in exactly the same situation as they are now; awaiting someone who wishes to build this type of housing.

Furthermore, petitioner fails to mention that one class of petitioners are non-profit organizations that are "ready, willing, qualified and able to build [low and moderate income housing] in Bucks County". These petitioners may easily litigate the issue of the constitutionality of any given municipal zoning ordinance by filing a request for change of zoning or apply for a building permit or apply for a variance or special exception. If they apply and are denied, they obviously will have standing; the suit will be ripe for determination and the MPC will be available as adequate remedy

at law to challenge the constitutionality of the ordinance in question.

Just as the courts of Pennsylvania refused to decide the questions presented because they were premature, your Honorable Court should dismiss the petition as "It is axiomatic that the federal courts do not decide abstract questions posed by parties who lack 'a personal stake in the outcome of controversy' ". *Baker v. Carr*, 369 U.S. 186 (1962); *Flast v. Cohen*, 392 U.S. 83,101 (1968).

C. *The complaint was dismissed because the affirmative relief is not available and presents a non-justiciable controversy.*

In addition to the foregoing reasons for dismissing the petitioner's complaint in equity, Judge Satterthwaite also found that with respect to the affirmative requests for relief, the court did not have the power to order the relief. Rather than a detailed discussion of the various statutes involved, the Court is referred to Judge Satterthwaite's opinion in petitioner's Appendix "C" A13-A15, and also, that the relief sought was non-justiciable in that the court would be injected into a political controversy acting as a super legislative body which it will not do.

The Supreme Court of Pennsylvania has held that courts will not undertake to reform zoning ordinances as this is a legislative function. The court held in *National Land and Investment Company v. Easttown Township Board of Adjustment*, 419 Pa. 504 (1965):

> "In the span of years since 1926 when zoning received its judicial blessing, the art and science of land planning has grown increasingly complex and sophisticated. The days are fast disappearing when the judiciary can look at its zoning ordinance and with nearly as much confidence as a professional expert, decide upon the merits of a zoning plan and its contribution to the health, safety and morals for general

> welfare of the community. This Court has become increasingly aware that it is neither a super Board of Adjustment nor a Planning Commission of last resort . . . instead the Court acts as a judicial overseer drawing the limits beyond which the local regulations may not go, but loathing to interfere with those limits, with the discretion of the local governing boards . . . the zoning power is one of the tools of government which, in order to be effective, must not be subjected to judicial interference unless clearly necessary." 419 Pa. at 521.

As the complaint requests the court to supervise the reformation of all of the zoning ordinances of the municipalities of Bucks County, it requests the court to participate in the legislative process and interfere with municipal discretion and is, therefore, non-justiciable.

Furthermore, the request for affirmative relief presents no clear-cut constitutional issues. President Judge Bowman of the Commonwealth Court of Pennsylvania described the complaint in his concurring opinion affirming Judge Satterthwaite's opinion, as follows:

> "A multi-class action in equity seeking unprecedented judicial interference in an arrogation over planning and zoning affairs of every local government in Bucks County, the County itself and their related Boards and Commissions in performance of their powers and duties as conferred and imposed upon them by the legislative branch of the government of this Commonwealth impels judicial restraint in cases such as this where the justiciable issue, while postulated upon alleged violations of constitutional rights, is but a symbolic narrative of conjecture, supposition and abstraction as supportive of the alleged cause of action." (Petitioner's Appendix "B", A2).

Thus, the instant case is similar to *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), in which the Socialist Labor Party brought suit against the election laws of Ohio alleging

denial of equal protection for restricting access of minority parties to the polls. Prior to the issue being submitted to the Supreme Court, a new law was passed rendering a majority of the issues moot. However, presented to your Honorable Court for its determination was the decision of the district court holding that an oath required of candidates in Ohio, was unconstitutional. There was no suggestion in the complaint that the *Socialist Labor Party* had ever refused in the past or will now refuse or will refuse in the future to sign the required oath. There is no allegation of injury that the party had suffered or will suffer because of the existence of the oath. In short, that case parallels the instant case in that the petitioners have not alleged that they have suffered an actual injury from the operation of the zoning laws of any respondent or that they will in the future. The court in dismissing the appeal held as follows:

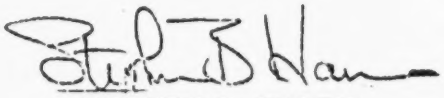
> The long and short of the matter is that we know very little more about the operation of the Ohio affidavit procedure as a result of this law suit than we would if a prospective plaintiff who had never set foot in Ohio had simply picked this section of the Ohio election laws out of the statute books and filed a Complaint in the district court setting forth the allegedly offending provisions and requesting an injunction against their enforcement. These plaintiffs may well meet the technical requirement of standing, and they may be parties to a case or controversy, but the case is not given any particularity to the effect on them of Ohio's affidavit requirement.
>
> This Court has recognized in the past that when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form' *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. Id. at 574.

The instant case does not tender any of the underlying constitutional issues in a clean-cut and concrete form. The problems of prematurity and the request for an abstract decision do not present a federal question which your Court should undertake to decide. Consequently the Petition for Certiorari should be denied.

CONCLUSION

Respondents respectfully request that your Honorable Court enter an order denying the Petition or Writ for Certiorari to the Supreme Court of the United States of Pennsylvania because adequate state grounds exist for the decision of the courts of Pennsylvania dismissing the petitioner's complaint and, therefore, no federal question is presented.

Respectfully submitted,



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APPENDIX "A"

EXCERPTS OF COMPLAINT

* * * *

5. Plaintiff Bucks County Interfaith Housing Corporation is a non-profit housing development corporation having its principal office at 32 North Broad Street, Doylestown, Bucks County, Pennsylvania, incorporated under the laws of the Commonwealth for the purpose of sponsoring, developing, and building low-income and moderate-income housing, and said Plaintiff is ready, willing, qualified and able to build such housing in Bucks County, but is unable to do so for the reasons set forth hereinafter.

6. Plaintiff Suburban Action Institute is a nonprofit charitable trust organized under the laws of the State of New York, having its principal office at 180 West Post Road, White Plains, New York, which, with its subsidiary nonprofit development corporations, sponsors, develops and builds low-income and moderate-income housing, and said Plaintiff is ready, willing, qualified and able to build such housing in Bucks County, but is unable to do so for the reasons set forth hereinafter.

133. Plaintiff Corporations are ready, willing and able to construct low-income and moderate-income housing in the County and would proceed to purchase and develop sites suitable for such purposes if the discriminatory aspects of the present practices and procedures of the Defendants were eliminated, and unless there is jurisdiction in equity, a multiplicity of suits will have to be filed in the future for the causes of action set forth herein and for each and every project in each municipality.

APPENDIX "B"

The following municipalities join in this brief in opposition to the Writ of Certiorari to the Supreme Court of Pennsylvania:

Bedminster Township
Bensalem Township
Bridgetown Township
Bristol Township
Buckingham Township
Bucks County Commissioners
Bucks County Planning Commission
Chalfont Borough
County of Bucks
Doylestown Borough
Doylestown Township
Dublin Borough
Durham Township
East Rockhill Township
Falls Township
Haycock Township
Hilltown Township
Hulmeville Borough
Ivyland Borough
Langhorne Borough
Lower Southampton Township
Middletown Township
Milford Township
Morrisville Borough
New Britain Borough
New Britain Township
New Hope Borough
Newtown Borough
Newtown Township
Nockamixon Township
Northampton Township
Penndel Borough
Perkasie Borough
Plumstead Township
Quakertown Borough
Richland Township
Richlandtown Borough
Riegelsville Borough
Sellersville Borough
Silverdale Borough
Solebury Township
Springfield Township
Telford Borough
Tinicum Township
Traumbauersville Borough
Upper Makefield Township
Upper Southampton Township
Warminster Township
Warrington Township
Warwick Township
West Rockhill Township
Wrightstown Township
Yardley Borough

SUPREME COURT, U. S.

FILED

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CLERK

In The

Supreme Court of the United States

NO: 73-693 October Term, 1973

COMMONWEALTH OF PENNSYLVANIA and BUCKS COUNTY INTERFAITH HOUSING CORPORATION, a Non-Profit Corporation, SUSAN CUMMINGS, RAMONA MORALES SERRANO, JEANNE COTTON, PEDRO ORTIZ, OLIVIA MOFFIT, Individually and on Behalf of Others Similarly Situated,

Petitioners,

vs.

COUNTY OF BUCKS and BUCKS COUNTY PLANNING COMMISSION and BUCKS COUNTY HOUSING AUTHORITY and All of the Municipalities of Bucks County (Individually Named in Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania),

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT, BENSALEM TOWNSHIP

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In The

Supreme Court of the United States

October Term, 1973

COMMONWEALTH OF PENNSYLVANIA and BUCKS COUNTY INTERFAITH HOUSING CORPORATION, a Non-Profit Corporation, SUSAN CUMMINGS, RAMONA MORALES SERRANO, JEANNE COTTON, PEDRO ORTIZ, OLIVIA MOFFIT, Individually and on Behalf of Others Similarly Situated,

Petitioners,

vs.

COUNTY OF BUCKS and BUCKS COUNTY PLANNING COMMISSION and BUCKS COUNTY HOUSING AUTHORITY and All of the Municipalities of Bucks County (Individually Named in Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania),

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT BENSALEM TOWNSHIP

STATEMENT OF THE CASE

Respondent, Bensalem Township, accepts the petitioners' statement of the case except for what it believes is necessary to correct the following inaccuracies:

Petitioners allege that the complaint was dismissed on the federal grounds that petitioners did not have standing to assert their federal claims and that consideration of these federal claims would not be a justiciable issue. Respondent, Bensalem Township, believes that the federal questions alleged by petitioners did not arise at any time in the state court proceedings, and were not at any stage in the state proceedings, considered, reached, ruled upon, or applied by the state court. To the contrary, the Supreme Court of Pennsylvania denied the petition solely on the issue of Pennsylvania statutory rules of procedure and general principles of law relating to what is a cognizable and justiciable cause of action in the Courts of Pennsylvania (Petition for Certiorari, Appendix C, A9).

Respondent, Bensalem Township, further believes the federal questions raised by petitioners present no real and substantial questions for the Court to decide, in view of a clear statutory remedy in the state courts.

ARGUMENT

I.

THE UNITED STATES SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE PETITION FOR A WRIT OF CERTIORARI.

The jurisdiction for this petition for writ of certiorari is alleged to be under 28 U.S.C. Section 1257 (3):

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It is basic hornbook law that the federal right or question proposed for Your Honorable Court must have been distinctly and clearly presented for decision in the state court, have been considered and applied by the state court, and have been adjudicated adversely to the claimants. See, e.g. Rule 19.1(a), *Copperwald Steel Co. v. Industrial Commission of Ohio*,324 U.S. 780, 89 L. Ed. 1363, 65 S. Ct. 1006 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207, 80 L. Ed. 158, 56 S. Ct. 183 (1935); *Socialist Labor Party v. Gilligan*,406 U.S. 583, 32 L. Ed.2d 317 (92 S. Ct. 1716 (1972).)

Argument

Respondent, Bensalem Township, concedes that petitioners raised in their voluminous complaint various federal rights (see, Petition for Writ of Certiorari, Appendix G, A26-A29), but believes that the Pennsylvania Courts did not decide the case on the basis of any such federal right or question. Their complaint was dismissed entirely on questions of Pennsylvania statutory procedure.

At no time have the petitioners, one of which is the Commonwealth of Pennsylvania, challenged the state law under which municipalities are empowered to enact zoning ordinances and regulations. The *Pennsylvania Municipalities Planning Code (MPC)* of July 31, 1968, P. L. , No. 247, as amended, 53 P.S. Section 10101 et seq. Yet it is the MPC which provides the exclusive and constitutionally adequate means of challenging the validity of zoning ordinances by any person aggrieved by such ordinances. See, *Unger v. Township of Hampton*, 437 Pa. 399, 263 A. 2d 385 (1970).

The Trial Court did not adjudicate, deny or in any way adversely affect the rights of petitioners; as the Court stated:

> "... it does not undertake to decide academically the unconstitutionality or other alleged invalidity of legislation until it is brought into operation so as to impinge upon the rights of some person or persons. Knup v. Philadelphia, supra, 386 Pa. at 353" (Petitioners' Appendix C, A10).

Argument

Respondent, Bensalem Township, concedes that petitioners have "standing" to challenge alleged discriminatory zoning practices by a particular municipality. Respondent, Bensalem Township, agrees with petitioners' contention that:

> "The Commonwealth (of Pennsylvania) has the inherent power to effect legislation dealing with the preservation of the public health, safety, morals and general welfare of all its citizens and the Commonwealth (of Pennsylvania) has enacted legislation delegating certain areas of its police powers to subordinate public bodies and agencies . . . in regard to comprehensive planning, subdivision and land development . . . (Petitioners' Complaint *our* Appendix A, Paragraph 108).

and further

> ". . . The Commonwealth did not, and could not, delegate to the Municipalities the authority to consider only the welfare of the present residents of the Municipality and not the welfare of all the residents of the Commonwealth, and Section 701 of the Code . . . provides for consideration by the Municipalities of the interests of 'all the citizens and residents of this State' " (Petitioners' Complaint, *our* Appendix A, Paragraph 109).

In further amplification of the clear proposition that petitioners have a full and adequate statutory remedy within the Commonwealth of Pennsylvania Courts, the Municipal Planning Code includes provisions whereby

"persons aggrieved" may challenge the provisions or validity of a Municipality's zoning ordinance on substantive grounds.

The United States Supreme Court, in *Utley v. St. Petersburg*, refused to review the state court decision, finding that an adequate administrative remedy was afforded petitioners by the challenged state statute and further finding that the objectors had ignored the available remedy. *Utley v. St. Petersburg*, 292 U.S. 106, 78 L. Ed. 1155, 54 S. Ct. 593 (1934).

Petitioners have at no stage of these proceedings attempted to avail themselves of their clear and basically simple statutory rights. Petitioners have at no stage of these proceedings attempted to demonstrate with evidence and facts that respondent, Bensalem Township, which does allow and now has within its borders, federally-subsidized housing, discriminates against petitioners economically, racially, or in any other manner. Petitioners have at no stage in these proceedings pursued or been denied the enforcement powers of the various courts of the Commonwealth of Pennsylvania, but rather have been denied their quest for an advisory opinion as to overly-broad allegations of discrimination against all respondents.

Petitioners, including the Commonwealth of Pennsylvania, failing to attack the enabling legislation of the Commonwealth of Pennsylvania (MPC), are attempting to attack collaterally respondent Township's use and application of the enabling legislation. The various courts of Pennsylvania have long recognized the rights of all

citizens and residents of the Commonwealth in matters of land use and zoning, and have consistently acted to protect and preserve those rights where municipal ordinances or regulations are determined to be invalid or unconstitutional on their face or in their application. See e.g. *National Land and Investment Company v. Easttown Township Board of Adjustment*, 419 Pa. 504, 215 A2d 597 (1965); *Girsh* Appeal, 437 Pa. 237, 263 A2d 395 (1970). Yet, as the Trial Court in the instant proceedings found:

> "It is almost hornbook law that the statutory remedies and methods of procedure to raise questions of interpretation, application and validity of zoning ordinances are exclusive and must be strictly pursued" (Petitioners' Appendix C, A9).

Their petition for writ of certiorari to Your Honorable Court boldly seeks, not legal redress for alleged wrongs, but rather the concurrence of the Court in their unsubstantiated and untested opinion that discrimination is practiced by the various respondents.

Their raising of federal questions, whether timely or not, but not actually decided, is merely an attempt to "bootstrap" themselves into a position of being aggrieved parties properly before the Court.

Granting a petition for writ of certiorari in the present posture of these proceedings will lead the Court merely to the issuance of an advisory opinion concerning abstract principles of discrimination in relation to zoning, without

a judicial resolution of the issues of constitutionality, and therefore the exercise of jurisdiction by Your Honorable Court by issuance of a writ of certiorari is certainly unwarranted.

CONCLUSION

Respondent, Bensalem Township, respectfully prays Your Honorable Court to enter its order denying the petition for writ of certiorari to the Supreme Court of Pennsylvania.

JOHN W. DEAN, III
DEAN AND McCOY
Attorneys for Respondent,
BENSALEM TOWNSHIP

APPENDIX A

PARAGRAPHS OF COMPLAINT

108. The Commonwealth has the inherent power to effect legislation dealing with the preservation of the public health, safety, morals and general welfare of all its citizens and the Commonwealth has enacted legislation delegating certain areas of its police powers to subordinate public bodies and agencies, giving them authority to enact ordinances promoting the public health, safety, morals and general welfare, in regard to comprehensive planning, subdivision and land development, and zoning, by the legislative enactment of the Pennsylvania Municipalities Planning Code of 1968, Act No. 247, 53 P.S. 10101, et seq. (hereinafter referred to as "Code".)

109. The Commonwealth did not, and could not, delegate to the Municipalities the authority to consider only the welfare of the present residents of the Municipality and not the welfare of all the residents of the Commonwealth, and Section 701 of the Code, 53 P.S. 10701 provides for the consideration by the Municipalities of the interests of "all citizens and residents of the State."

APPENDIX B

PENNSYLVANIA MUNICIPALITIES PLANNING CODE

Section 105. Purpose of Act. - It is the intent, purpose and scope of this act to protect and promote safety, health and morals; to accomplish a coordinated development of municipalities, other than cities of the first and second class; to provide for the general welfare by guiding and protecting amenity, convenience, future governmental, economic, practical, and social and cultural facilities, development and growth, as well as the improvement of governmental processes and functions; to guide uses of land and structures, type and location of streets, public grounds and other facilities; and to permit municipalities, other than cities of the first and second class, to minimize such problems as may presently exist or which may be foreseen. It is the further intent of this act that any recommendations made by any planning agency to any governing body shall be advisory only.

Section 701. Purposes. - In order that the purposes of this act be furthered in an era of increasing urbanization and of growing demand for housing of all types and design; to insure that the provisions of Article VI which are concerned in part with the uniform treatment of dwelling type, bulk, density and open space within each zoning district, shall not be applied to the improvement of land by other than lot by lot development in a manner that would distort the objectives of that Article VI; to encourage innovations in residential development and renewal so that the growing demand for housing may be met by greater variety in type, design and layout of dwellings and by the conservation and more efficient use of open space ancillary to said dwellings; so that greater

opportunities for better housing and recreation may extend to all citizens and residents of this State; and in order to encourage a more efficient use of land and of public services and to reflect changes in the technology of land development so that economies secured may enure to the benefit of those who need homes; and, in aid of these purposes, to provide a procedure which can relate the type, design, and layout of residential development to the particular site and the particular demand for housing existing at the time of development in a manner consistent with the preservation of the property values within existing residential areas, and to insure that the increased flexibility of regulations over land development authorized herein is carried out under such administrative standards and procedures as shall encourage the disposition of proposals for land development without undue delay, the following powers are granted to all municipalities (Section 702 - Grant of Powers - Deleted).

Section 1011. Judicial Relief. - (1) In a zoning appeal the court shall have power to declare any ordinance or map invalid and to set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal.

(2) If the court finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or failure to act is in question on the appeal, it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer

other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings including the adoption of alternative restrictions, in accordance with the court's opinion and order. The court shall retain jurisdiction of the appeal during the pendency of any such further proceedings and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order.

(3) The fact that the plans and other materials referred to in subsection (1) are not in a form or are not accompanied by other submissions which are required for final approval of the development or use in question or for the issuance of permits shall not prevent the court from granting the definitive relief authorized in subsection (2) and the court may act upon preliminary or sketch plans by framing its decree to take into account the need for further submissions before final approval is granted.

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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-693.

COMMONWEALTH OF PENNSYLVANIA and BUCKS COUNTY INTERFAITH HOUSING CORPORATION, a Non-Profit Corporation, SUSAN CUMMINGS, RAMONA MORALES SERRANO, JEANNE COTTON, PEDRO ORTIZ, OLIVIA MOFFIT, Individually and on Behalf of Others Similarly Situated,

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COUNTY OF BUCKS and BUCKS COUNTY PLANNING COMMISSION and BUCKS COUNTY HOUSING AUTHORITY and All of the Municipalities of Bucks County (Individually Named in Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania),

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania.

REPLY BRIEF TO RESPONDENT'S BRIEF.

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ARGUMENT.

In the three briefs filed by Respondents, Respondents contend that the Petition for Writ of Certiorari should be denied for the following reasons:

(a) Petitioners failed to follow statutory remedies and procedures available under the Pennsylvania Municipalities Planning Code;

(b) Petitioners' action was premature and sought an advisory adjudication on hypothetical facts; and

(c) The Court could not grant the relief requested by the Petitioners.

Even if the Supreme Court concludes that the Pennsylvania courts were concerned about the issues mentioned by the Respondents, consideration of these issues involves federal questions rather than state law, with the exception of the question of the granting of the relief requested. Consideration of the issue of relief is premature at this stage of the case. No answer has been filed to the Complaint; the issues are not drawn; and there is no factual record.

In regard to the purported availability of statutory remedies and procedures, the difficulty which the Petitioners face is that the Pennsylvania Municipalities Planning Code, 53 P. S. §10101, et seq., does not include persons in the status of the Petitioners as the kinds of persons who may be granted relief. The Pennsylvania Municipalities Planning Code is based upon the Standard State Zoning Enabling Act. See Krasnowiecki, "Zoning Litigation and the New Pennsylvania Procedures," 120 *Univ. of Pa. L. Rev.* 1029 (1972). See also *Id.* at 1103, n. 299. This Act grants standing to landowners, equitable owners, adjoining landowners, and residents. The Act does not recognize standing in future residents.

It may be argued that the zoning ordinances do not restrain the activities of future residents since the zoning restrictions apply only to landowners. This is true. The future residents are in a situation comparable to that of the person who desires an abortion. See *Roe v. Wade*, — U. S. — (1973). The abortion statutes do not make her act a criminal act. The statute restricts the activities of others, to wit, the doctor who commits a criminal act by performing the abortion. However, if doctors are prohibited from performing abortions, the person who desires them cannot obtain them. There is no way, except by an action in equity, for the person who wants an abortion to make out a ripe case by getting herself arrested for participating in an abortion since her act is not a criminal act. Her case is ripe when she is pregnant and wants an abortion.

Similarly, the zoning ordinances apply to landowners and not to future residents. However, to the extent to which these zoning restrictions preclude the construction of housing, they have the effect of preventing persons from becoming residents of the municipality and thereby exclude them. So that it is their rights which are at stake. The Pennsylvania courts, though, require that the challenge to the validity of the zoning ordinances be brought by someone who has applied for development. Since the future residents are not developers, they cannot pursue the remedy available to developers and must assert their rights in an action in equity. Their action is ripe if they desire to reside in an area in which there is no housing as a result of exclusionary zoning.

There are non-profit corporations which desire to develop subsidized housing in Bucks County which have joined the future residents and the Commonwealth of Pennsylvania as Petitioners. Their Complaint also does not

refer to particular sites but to the general and complete unavailability of sites which are not subject to zoning restrictions which prevent the construction of subsidized housing. There is no reason why they should not be permitted to challenge the overall system of zoning restrictions which results in unavailability of sites upon which subsidized housing can be constructed rather than litigating in a piecemeal nature each and every site upon which they want to build.

Respondents also contend that Petitioners request a decision in abstract which amounts to an advisory opinion. But this is the same issue presented in another way. Respondents, and the Pennsylvania courts, insist that a challenge to the validity of exclusionary zoning may be presented only by someone who wants to contest the prohibition of construction upon a particular site. This is fine for a developer who has such a site, but it does not allow the person who has been excluded to contest the validity of his exclusion. In other words, it denies him standing. There is no assurance that there will be actual construction after the zoning restriction is invalidated. Similarly, there is no assurance that there will be doctors willing to perform abortions after the abortion statute is invalidated at the request of the person who desires the abortion. (To avoid this, in *Roe v. Wade*, a doctor was added as a plaintiff. In the instant case, non-profit corporations which desire to build subsidized housing joined as plaintiffs.)

There is, of course, no factual record. But, Petitioners have had no opportunity to make such a record since preliminary objections in the nature of a demurrer were sustained. Once there is such a record, the case will certainly be more concrete than it is at its present juncture. Just as the question of appropriate relief may only be determined after a record is made, so the question of

whether Petitioners can prove their cause of action must also be deferred until that stage of the case, assuming that Petitioners have standing to present a case. Whether Petitioners have such standing is the federal question at issue in the instant matter.

Respectfully submitted,

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